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PRECACE

This paper is not intended to reflect Department policy, opinion, or viewpoint. Because of exceptions and varying interpretations that are most certain to exist, this article also cannot be construed as being absolutely accurate for all or any actual circumstances that might occur.

This article ~~THE GOVERNING OF INDIAN RESERVES~~ is a general statement of effect rather than as a comprehensive analysis of the Band/Department relationship under the Indian Act. Within these limitations ~~AUTHORITIES OF THE BAND AND MINISTER~~ novice Band and department staff should be able to learn of the responsibilities and authorities a Band and the Minister are given under the ~~ACT~~ ~~UNDER THE INDIAN ACT~~ of Indian communities.

This paper was prepared by Mark Manitowabi, Policy Advisor, for the Policy Coordination and Band Government Development Branch under the supervision of Richard Paton, A/Director, PCBG.

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Mark Manitowabi,
PCBG, July 23, 1980.
D.I.A.N.D.

THE GOVERNMENT OF INDIAN RESERVES

AUTHORITY OF THE BAND AND MINISTER

UNDER THE INDIAN ACT

Mark Munifomesdy
PCBC, 901A 52, 1980.

D.I.A.I.

PREFACE

This paper is not intended to reflect Department policy, opinion, or viewpoint. Because of exceptions and varying interpretations that are most certain to exist, this article also cannot be construed as being absolutely accurate for all or any actual circumstances that might occur.

This article is intended to serve as a general statement of effect rather than as a comprehensive analysis of the Band/Department relationship under the Indian Act. Within these limitations, a broad audience of lay persons or novice Band and department staff should be able to learn of the responsibilities and authorities a Band and the Minister are given under the Act for the management of Indian communities.

This paper was prepared by Mark Manitowabi, Policy Advisor, for the Policy Coordination and Band Government Development Branch under the supervision of Richard Paton, A/Director, PCBG.

- a. Responsible - Has a duty to meet the will and needs of the people by performing activities and services required by citizens and can be held responsible for its actions.
- b. Accountable - It is held liable to the electorate for the right use of power thereby ensuring that the government does not over or under govern.
- c. Popular process - Elections, referenda, any instrument whereby citizen participation can be exercised - this is not limited by reasons of taste or other arbitrary criterias.

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TO DERIVE INDIAN GOVERNMENT FROM THE INDIAN ACT

June 11, 1980

PREFACE

The purpose of this paper is to discuss the effects and implications of the Indian Act upon the duties of the Minister and Band Councils for Indian Government.

To begin with, a series of definitions are needed in order that common understanding of terms and concepts will facilitate discussion.

1. What is government?

Legitimate Government is that body which through popular process, exercises authorities on behalf of the governed.

- a. Legitimate government - government that is put in place and can be changed by the governed. Legitimate government has several characteristics.
- b. Responsible - has a duty to meet the will and needs of the people by performing activities and services required by citizens and can be held responsible for its actions.
- c. Accountable - it is held liable to the electorate for the right use of power thereby ensuring that the government does not over or under govern.
- d. Popular process - Elections, referenda, any instrument whereby citizen participation can be exercised - this is not limited by reasons of taste or other arbitrary criteria.

e. Authorities - Permission from the governed and higher legislation to exercise certain powers with clearly defined parameters.

The structure of a government is described in a written document because the needs of modern society have outstripped the ability for oral tradition and organic custom to handle the complexities of government.

The formal document is written as law or legislation. The Indian Act is a piece of legislation of the Federal Government of Canada. It is one of hundred of Acts written by the Federal Government. The first legislation about Indians was written before Confederation. The last major revision of the Indian Act occurred in 1951 and it is this Act which we now discuss.

The purpose of the following is to become familiar with the content of the Indian Act and its effects on Indian Government. This should help during later discussion since the Act will be understood, rather than viewed as a mysterious collection of laws about Indians.

N.B. A very difficult trait of human nature arises when we discuss the Act. That is, the tendency of making value judgements. If the Indian Act is viewed as a restrictive, oppressive document, or as an Act which sought to protect Indians and manage Indian land, two very different pictures would emerge.

The following hopefully pursues an objective approach and in addition to providing understanding of the Act, it should also clearly state exactly what is provided or not provided in the Act. De-mything, so to speak.

INTRODUCTION

RESPONSIBILITY AND POWER OF BAND GOVERNMENTS (INDIAN GOVERNMENT)

Concerns of Community-based Government

Local governments are established in order that the people living in a community can have some control over their lives. The people want to ensure that their government reflects their needs and values. The people want to ensure that their resources are used for them in the best manner possible - that they are not squandered or left to languish.

To form a community government is to create a body with certain powers and structure. Such creations are limited by whatever laws are found to apply to particular cases. In the case of Indian Bands and Reserves, the Indian Act is the controlling legislation.

The following will examine and discuss the enabling functions of the Indian Act to provide local government functions for the Minister and Indians. In other words, what jobs and responsibilities do the Minister and Band politicians get from the Indian Act.

I Indian Government Powers - Indians

A. Representative process - There is no provision in the Act prescribing how a group of Indians can petition to form a Chief and Council or otherwise come under the Act. Discretion to direct that a Chief and Council be elected resides with the Minister.

But assuming every established Band has a Chief and Council by the Minister, election proceedings are subject to the Act and the Indian Band Election Regulations. This means that the only way that a Band can appoint officials to represent it is by electing a Chief and Council in the manner described in the Indian Act.

Further, should a Band desire to change its representative process by changing voting age, number of councillors, residency requirements, filling vacancies on council, council meeting procedures, and so forth, that Bands may do so only with the approval of the Minister and by using the process given in the Act. If the system provided in the Act does not suit a Band's particular situation, nothing can be done and a Band is forced to operate with an unwanted political system.

See S 74-80 - Elections

PC 1953-1313 - Indian Band Council Meetings Regulation

PC 1954-1367 - Indian Band Election Regulations

B. Regulatory Powers

A Band Council may make by-laws regulating such activities as are mentioned in the Act. There are two categories. One category deals with regulations for public peace and good such as traffic, public peace, livestock, public words, game management, health. These by-laws are passed subject to disallowance by the Minister if the by-law is in conflict with any other part of the Indian Act or other Regulation made pursuant to the Act on the opinion of the Minister. The status of these by-laws are unclear as to whether or not they succeed Provincial or other laws, or if by-laws governing surrendered land on Federal buildings are effective. This means that Band Council by-laws carry the least authority of any regulations affecting the Reserve and are of doubtful strength or use.

The other category of Council by-laws deals with authority to raise and expend money for Band purposes by local taxation. A Band Council may receive authority to pass by-laws which tax land interest or businesses and impose penalties for non-payment. This authority requires the approval of the Minister. The Governor in Council may revoke the authority for a Band Council to make such by-laws and may also revoke the by-laws.

C. Resource management and administration

There are different types of resources about which a local authority must be concerned. These are anything a community may work with in order to maintain or advance its lifestyle. We will look at these resources:

1. Land
2. Public Service
3. Band Funds
4. Natural Resources
5. Social and Economic Development.

Land

Land Tenure including Registry -

No allotment of land on a Reserve made by the Band Council is lawful without the approval of the Minister who shall also maintain the Register and issue certificates of possession or occupation.

The Act does provide an allotment system. However, management of Reserve land is largely outside of a Band Council's authority.

Land use - Proposed surveys, subdivisions, road planning, require the approval of the Minister.

- Leases to non-Indians are possible only on surrendered land and are managed by the Minister
- The Band Council may give consent for the Minister to utilize land for agricultural purposes.

- The Band Council may exercise such control over Reserve land as the Governor in Council considers desirable.

This means that a Band's authority to manage Reserve Land is limited to zoning by-laws which again are subject to disallowance and to making allotments without which C.P.'s cannot be issued.

The only control to be exercised over surrendered land is by conditional surrender, but enforcement is unclear. The process is slow, cumbersome and because the Department must provide Program staff, expensive.

To sum up, the Governor in Council determines if any proposed use of land is to the use and benefit of the Band. A Band Council, in effect, can advise only - not administer or manage Band land in its own right.

See S2	-	Interpretations "Reserve" "Surrendered Land"
S18-19	-	Reserves
S20, 28	-	Possession of Lands in Reserves
S35	-	Lands taken for public purposes
S36	-	Special Reserve
S37-41	-	Surrenders
S53-60	-	Management of Reserves and Surrendered Land.

2. Public Services - Local governments are usually responsible for providing various services and programs to the community.

These usual programs are:

- Public works including roads, water and sanitation, house construction, transportation, street lighting, wharves and docks.
- Social service programs including child care, adult, indegent and geriatric care.
- Education including purchase of services, operation of schools.
- Community protection including law enforcement, health services, fire protection.

A Band Council is neither authorized nor prohibited under the Act to operate any of these as programs.

To be sure, a Band Council may give consent for the Minister to make certain expenditures from Band Capital and Revenue Funds, but these are more of a project rather than program nature. Further, the power to pass regulatory by-laws under Sec. 81 is not the same as having power to operate a service.

This means that any specific authority for programs operated by a Band Council must emerge elsewhere than from the Act. Thus have emerged Contribution Agreements and the turnover of programs from the Department to Bands.

See S. 81 - Powers of Council
- Appropriations Act

3. Band Funds - Most Bands have some cash resources held in trust by the Minister. These funds, like Indian land, may be used only for the use and benefit of the Indians to which the assets belong. A Band Council may give consent for the Minister to expend Band Capital or Revenue funds for most of the purposes listed under Services. Further, a Band may be authorized by the Governor in Council to manage its Revenue funds subject in varying degrees according to the Finance Administration and Indian Acts. Again, the Governor in Council decides whether any use of Band funds is for the use and benefit of the Band.

This means that a Band does not actually control its funds and any utilization of funds depends upon the perceptions of the Minister. Further, the cumbersome process which protects the Minister and Indian money can frustrate development because of delays.

See S61-69 - Management of Indian Money

4. Natural resources - These are considered as minerals, sand, gravel, clay, forest and agricultural products, water, game. Local authorities may control access and use of such resources by license, by-law, zoning.

A Band Council may make by-laws for the preservation, protection and management of fur-bearing animals, fish, and other game on the Reserve subject to the Act and other regulations of the Governor in Council or Minister.

The sale or disposal of sand, gravel, clay, aggregate, wood products, prairie produce, is subject to licence from the Minister or Superintendent not the Band.

The Band Council may give consent for the Minister to operate farms and sell wood, soil, etc on behalf of the Band.

This means that a Band Council has no undisputed authority to allocate resources on the Reserve to non-Indians. A Band Council by-law may be overruled or does not have the authority from primary legislation to control resource utilization - this rests with the Minister

See S32-33 - Sale or Barter of Produce
S57 - Regulations for licencing made by Minister
S81(0) - Powers of Band Council
S91 - Trading with Indians
S93 - Removal of Materials from Reserve
PC 1968-1865 - Indian Mining Regulations
PC 1954-2025 - Indian Timber Regulations

5. Economic Development - One of the primary roles of a local government is to ensure that whatever physical or economic development does occur is compatible with the community.

This is not readily deduced anywhere in the Act. Various sections give indications where economic development activity may take place but there is no discrete statement as such. Any related

activity, usually the sale of soil, wood, minerals, are subject to regulations by the Minister.

See S64(f) - Management of Indian Money

S70 - Loans to Indians

To conclude, Band Councils have very little administrative authority granted to them under the Act. Wherever a given provision for a service or function occurs, the Minister or Governor in Council executes the service or function. Wherever the Minister acts with the consent for the Band, the Minister still holds the power to decide finally if any action is for the use or benefit of the Band.

In other words, except to get elected, and give consent to the Minister's actions, Band Councils really do not have much to do with or under the Indian Act.

II Minister's Responsibilities and Powers

When considering the Minister's role under the Indian Act, the purpose of the Act becomes more clear than when Band Councils were discussed.

If we have seen that Band Councils cannot really use the Act because the Act gives Band Councils only limited authority then we will see that the Minister and the Act do have much more in common.

The Indian Act shall be administered by the Minister of Indian Affairs.

This means that the Minister of Indian Affairs is named as the member of Cabinet responsible for the Act and the affairs of Indians which fall under the Act. The Minister may delegate certain functions and authority, but

for whatever occurs pursuant to the Act, the Minister remains responsible to Parliament.

See S. 3(1)(2)

A. Representation

In the development of the Indian Act, Indians and lands reserved for Indians were seen to require protection. Therefore, the design of the Act is not so much for the management of Reserves by the Indians as it is for enabling the Minister to ensure that no harm befalls them. Thus the statement "... for the use and benefit of Indians."

The Governor in Council may make regulations for the elections of Chiefs and Band Councils. This power provides the Minister and Bands with a uniform process for electing Band representatives.

The Governor in Council may also make regulations for the conduct of Band Council meetings.

See S74-80 - Elections of Chiefs and Councils

PC 1954-1313 - Regulations Governing Procedure at
Indian Band Council meetings

PC 1954-1367 - Indian Band Election Regulations

Because of the heavy role given the Minister, it is difficult to differentiate among protective, administrative, or service functions. Recognizing this perceptual and semantic problem, we shall proceed.

B. Regulation of Reserves, Indian Property

Regulations are made to protect. There are many provisions within and pursuant to the Indian Act whereby the Minister or Superintendent is authorized to protect Indians and their lands from themselves and non-Indians.

Membership

The Registrar of Indian Affairs maintains the Indian Register, Band Lists and the General List. The Registrar also decides on eligibility for Status and Enfranchisement thereby making such deletions and additions as are required by the Act.

It is thus provided that land, money or rights granted to those who first became eligible to be registered as Indians and their descendants would not be endangered or enjoyed by those without legitimate claims or else having larcenous intentions.

See S5-7 - Definition and Registration of Indians
S109-113 - Enfranchisement

Land

The Minister finds himself responsible for Indian lands. His responsibility is to ensure that any use of land is indeed for the use and benefit of the Indians. Therefore, the Land Registry, issuance of certificates, administration of surrendered land and taking of surrenders are all the responsibility of the Minister.

This means that whatever intentions a Band has for its Reserve land or any given parcel, the approval of the Minister is required. The Minister then decides if the disposition is for the use and benefit of the Band - that rights on Indian land are not extended to any party that prejudices the best interests of the Band or are extended to any party that has no legitimate claim to Indian land.

See S18, 19 - Reserves
S20, 28 - Possession of Lands in a Reserve
S30, 31 - Trespass on Reserve
S35 - Land taken for Public Purposes
S36 - Special Reserves

Much the same can be said for administration of estates. That is, to ensure that the administration of Indian estates does not alienate Indian land or property.

See S42-52 - Descent of Property
PC 1955-1083 - Indian Act Estates Regulations

Band Funds

Indian money is held in Trust by the Federal Government for the use and benefit of Indians. Any expenditure made from capital or Revenue funds of a Band are made by the Minister with the consent of the Band Council. The Governor in Council determines interest to be paid to Indian money held in Trust.

See S61-68 - Management of Indian Money
- Financial Administration Act

Natural Resources

Any sale of soil, wood, or agricultural products in Saskatchewan, Alberta or Manitoba, are subject to licencing or permit by the Minister or Superintendent. This regulatory power of the Minister exists so that some mechanism is provided to guard against the sale of Indian goods at less than fair prices. At the time of writing of the Act, it was believed that the Indians were not sophisticated enough to understand the true value of their resources.

See S32, 33	-	Sale or Barter of Produce
S91, 92	-	Trading with Indians
S93	-	Removal of Materials from Reserve
S57	-	Regulations for licencing
PC 1968-1865	-	Indian Mining Regulations
PC 1954-2025	-	Indian Timber Regulations

Management and Protection of Bands

The Governor in Council may make regulations for the promotion of the general welfare and well-being of the Band.

Such regulations can cover wildlife, agricultural pests, motor vehicle traffic, livestock control, contagious disease control, medical and health services, dwelling inspections and Band financial borrowing.

See S73 - Regulations

C. Allocation and Administration of Services

This category of functions given to the Minister generally deals with developmental aspects of Bands. This is where the Minister may provide services which will lead to the advancement of individual Indians or Bands.

Education - Under the Act, the Governor in Council may authorize the Minister to enter into agreements with various agencies (not including Band Councils) to provide education services to Indians on and off-Reserve or to operate schools.

See S114-123 - Schools

Economic Development

The Minister, with the consent of the Band Council, may operate farms on Reserves and apply such profits in any way he considers desireable to promote the progress and development of the Indians.

See S71 - Farms

The Minister of Finance may advance money to the Minister to loan to individual Indians, Bands, or groups of Indians.

See S70 - Loans to Indians

Public Works

The Superintendent may give orders for the maintenance of roads and bridges on the Reserve at Band expense.

See S34 - Roads and Bridges

Once past the management of Indian Reserves, there remains portions of the Act which restrict the applicability of laws of general application to Indians on Reserves and Reserves. Depending upon viewpoints and circumstances, these exclusions can be seen as protections or hinderances to Indians.

1. Indian land, property not subject to tax or seizure (except by Indians) S87
2. Real and personal property not pledged except under conditional sales contract S89
3. Omnibus exclusion, Provincial laws of general application do not apply to Indians on Reserve if those laws are in conflict with Indian Act S88, 90
4. Reserve lands not subject to seizure under legal process S29
5. Provincial liquor laws may not apply S94-102
6. Treaty money may be paid S72

The result of all of this is a system of checks on any matter affecting Indians on Reserve. Wherever the Minister holds final responsibility, for his protection he must also hold final decision-making power so that he is not held responsible for a decision over which he had no control.

To conclude, it can be seen that the Indian Act was drawn so that the Minister could administer the affairs of Indians. The Act provides a uniform process which serves to protect the Minister and Indians from specious application of discretionary authority. The Act was drawn at a time when it was not envisaged that Bands would want to shoulder authority and responsibility

for their own affairs. As it is, the Act is static and outmoded when considered in a modern context which recognizes that the relationship between Minister and Indians has changed from paternalism to partnership.

Additional Reading

Historical Development of the Indian Act by Treaties and Historical Research
Centre, Indian and Northern Affairs, August, 1978

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